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No. 775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

COLUMBIA ARTISTS MANAGEMENT INC. and COMMUNITY CONCERTS, INC.,

Appellants,

against

UNITED STATES OF AMERICA; SUMMY-BIRCHARD, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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IN THE

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OCTOBER TERM, 1964.

COLUMBIA ARTISTS MANAGEMENT INC. and
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Appellants,

against

UNITED STATES OF AMERICA; SUMMY-BIRCHARD, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement as to Jurisdiction.

Appellants Columbia Artists Management Inc. (hereafter "Columbia") and Community Concerts, Inc. (hereafter "Community"), appeal from an order of the United States District Court for the Southern District of New York denying Claim II of their petition for construction of the Final Judgment in this action. The District Court held, without a hearing on the facts, that the Final Judgment, a consent judgment entered in 1955 in a civil action brought by the United States under the Sherman Act, is illegal and void insofar as it operates to allow resale price maintenance, and modified the judgment accordingly.

Opinions Below.

The District Court (Tyler, J.) filed two opinions, one on November 19, 1963 and the second, on reargument, on April 3, 1964. Neither opinion is reported officially. The

opinions are reported unofficially at 1963 Trade Cases ¶70,955 and 1964 Trade Cases ¶71,081, respectively. Both opinions and the order of the District Court are annexed hereto as Appendix A.

Jurisdiction.

On October 20, 1955 the United States brought an action under Section 4 of the Sherman Act (15 U. S. C. §4) against Columbia, Community*, a wholly-owned subsidiary of Columbia, National Concert and Artists Corporation (hereafter "NCAC") and Civic Concert Service Incorporated (hereafter "Civic"), a wholly-owned subsidiary of NCAC. The action sought to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§1 and 2). The title of the action as originally docketed was *United States* v. *Columbia Artists Management Inc. et al.* On October 20, 1955, concurrently with the filing of the action, a judgment on consent (hereafter "the Final Judgment") was entered. The Final Judgment is annexed hereto as Appendix B. Thereafter, Summy-Birchard, Inc. (hereafter "Summy-Birchard") acquired and conducted the business of NCAC and, pursuant to Paragraph III of the Final Judgment, became subject to its terms.

On July 17, 1963, Columbia petitioned the District Court for orders and directions for construction of the Final Judgment. Columbia's petition set forth two claims, designated as Claim I and Claim II. On November 19, 1963, the lower court filed an opinion granting Columbia's petition on Claim I and denying Claim II. Columbia moved for reargument on Claim II and that motion was granted in part in an order entered on January 14, 1964. Thereafter, reargu-

* Columbia and Community are herein sometimes referred to jointly as "Columbia".

ment was heard and, on April 3, 1964, the District Court filed a second opinion in which it reaffirmed its opinion of November 19, 1963.

The order of the District Court granting Claim I of Columbia's petition, denying Claim II, and modifying the Final Judgment, was entered on June 11, 1964. The notice of appeal was filed in that Court on August 7, 1964.

The jurisdiction of this Court to review the District Court's decision by direct appeal is conferred by Section 2 of the Expediting Act, Title 15, United States Code, Section 29. The following decisions sustain the jurisdiction of this Court to review on direct appeal the order in this case: *U. S. Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457 (1957); *Swift & Co.* v. *United States*, 276 U. S. 311 (1928); *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17 (1924).

Questions Presented.

The following questions are presented by this appeal:

1. In 1955, the Government brought a civil action under the Sherman Act against appellants and another. A Final Judgment was entered by the District Court on consent concurrently with the filing of the complaint. Where appellants, in 1963, petition the District Court to construe the Final Judgment to determine whether a provision in appellants' contracts violates the Final Judgment, and where the court finds that such provision is permitted by the Final Judgment, does the District Court have the power to modify the Final Judgment, without appellants' consent, to forbid the use of such provision where there is no showing of any change in fact or law since the judgment was entered?

2. Was the District Court correct in finding, without a hearing, that appellants' contract provision, contemplated

and sanctioned by the Final Judgment, constituted illegal vertical price fixing?

3. Assuming *arguendo* an affirmative answer to questions 1 and 2, should the court have properly vacated the entire Final Judgment?

Statement.

Columbia and Summy-Birchard are both managers of concert artists, acting as agents of the artist in arranging engagements, booking tours and also acting as their general advisors. The standard contract between Columbia and each artist managed by it provides for an artist's established fee, that is, the fee, set by the artist, at which he will perform. The standard contract further provides that no engagement may be booked at less than that established fee except upon the artist's consent.*

Community and Civic are in the concert service business. Concert services organize and maintain audience associations throughout the country. An audience association is a non-profit association organized for the purpose of presenting a series of concerts in a locality, and its members are citizens of that locality. The concert service sends field representatives into the locality to assist in the organization, fund-raising and membership drives conducted by the audience association. The funds collected from members are then used to book artists for a series of concerts which can be attended only by members of the association. The concert service's field representatives assist the audience association in selecting the artists who will be presented

* Columbia alleged and would have shown at a hearing that this provision is required by a collective agreement among managers and the concert artists' union, the American Guild of Musical Artists.

in the association's concert series. The artists selected must be booked for the association by the organizing concert service, and their fees are paid to that concert service. The concert service then transmits the fees to each artist's manager for ultimate payment to the artist, deducting a portion of each fee to compensate it for establishing and maintaining the association. This portion of the artist's established fee which the artist authorizes the concert service to retain is known as "margin", and is so defined in the Final Judgment.

As is required by its contracts with artists, Columbia's form contracts with concert services for the appearance of Columbia-managed artists before audience associations have provided for payment by the association of the artist's established fee for each engagement. Columbia's form contracts have stated in relevant part:

> "It is agreed that this contract for the appearance of [name of Artist] is solely for the purposes of an engagement on the organized audience series in [town] for [dates] at the fee of $ per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained from the artist or his manager will void this contract."

In 1963, Summy-Birchard informed Columbia that the aforesaid provision constituted illegal resale price maintenance and that it was a violation of the Final Judgment. Summy-Birchard stated that it would sign Columbia's form contracts for the appearance of Columbia's artists before Civic's audience associations under protest. Summy-Birchard's position, in essence, was that an artist's performance was "bought" by a concert service and then "sold" to an audience association and that the concert

service—and not the artist or his manager—had the right to determine the fee to be paid by the audience association.

Columbia replied that there could be no illegal resale price maintenance because the concert service did not "buy" artists' performances but merely acted as agent for the audience association in booking artists. In any event, Columbia contended there could be no violation of the Final Judgment because the decree makes specific provision in many places—such as in the definition of margin—for the artist's established fee, and thus clearly contemplates that the artist and not the concert service is to determine the price to be paid by the audience association for the artist's performance.

Pursuant to Paragraph IX of the Final Judgment, Columbia, on August 13, 1963, petitioned the District Court for orders and directions for the construction of the decree. Columbia's petition set forth two claims. Claim I, which dealt with another dispute with Summy-Birchard, is not here relevant. In Claim II of its petition, which is the subject of this appeal, Columbia sought an order that its contract provision did not violate the Final Judgment.

Summy-Birchard answered Columbia's petition admitting certain allegations and denying others. The Government appeared and supported Columbia's position on Claim I but took no position on the merits of Claim II on the grounds that there was no justiciable controversy between Columbia and Summy-Birchard. No affidavits were submitted by the parties and no trial or hearing on the facts was held.

On November 19, 1963, the District Court filed its opinion granting Columbia's petition on Claim I but denying Claim II. With respect to Claim II, the court held (App. A pp. 8-9) that the Final Judgment:

> "... clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer'—audience association, impresario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless."

But then, treating Summy-Birchard's papers and oral argument as a petition for modification of the decree*, the court reviewed *de novo* the legality of the Final Judgment and found the decree to be in part illegal under the Sherman Act. The court ruled (App. A p. 11) that:

> "... insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid."

The court said that if a concert service was the agent either of the artist or of the audience association "... there is, of course, no 'sale' and no illegal pattern which falls afoul of the Sherman Act" because there would no longer be an intermediate party between the original seller and ultimate buyer. The court held, however, that no agency

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* The District Court said (App. A pp. 9-10):

> "At least in the special circumstances of this case, in which the court has already retained jurisdiction to hear motions for construction of its decree and in which it appears that the legality of the decree, or at least of practices envisioned by or naturally flowing from the decree, is being questioned, it would seem to be hypertechnical and time-consuming judicial administration to reject jurisdiction of this particular dispute just because Summy-Birchard has not filed a paper labeled 'petition for declaratory judgment' or 'petition for modification', particularly if substantially the same facts and arguments to be raised by such putative formal pleadings are now before the court."

relationship existed. The District Court concluded that ". . . Summy-Birchard may charge its audience associations [for artists] whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance . . . " (App. A pp. 10, 12).

Columbia moved for reargument on the same grounds now urged for reversal. On January 14, 1964, the District Court granted Columbia's motion on the question whether an agency relationship existed between an audience association and a concert service, stating that affidavits and memoranda on the issue would be received. Columbia submitted an affidavit from one of its officers to the effect that such relationship existed between Community and its audience associations. Neither the Government nor Summy-Birchard submitted affidavits. The Government submitted a memorandum stating that the court's decision was correct and should be reaffirmed. On April 3, 1964, the court filed its opinion on reargument, reaffirming its previous decision.

In its order, entered on June 11, 1964, the District Court reiterated its position that the decree sanctioned Columbia's contract provision, but was illegal insofar as it contemplated resale price maintenance. The order stated in relevant part

> "To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid" (App. A p. 22).*

* The Government objected vigorously to the inclusion of this sentence in the order on the grounds that the District Court had not modified the Final Judgment, and did not ". . . find a single word in the Final Judgment to be illegal or void." Government Memorandum of June 4, 1964, p. 2. The District Court rejected the Government's argument.

The First Question is Substantial.

A consent decree, like an ordinary judgment, is a judicial act, *Pope* v. *United States,* 323 U. S. 1, 12 (1944); *United States* v. *Swift & Co.,* 286 U. S. 106, 115 (1932); *United States* v. *Radio Corporation of America,* 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed,* 318 U. S. 796 (1943), and is *res judicata* as to the matters actually settled therein. *Lawlor* v. *National Screen Service,* 349 U. S. 322, 327-329 (1955); *United States* v. *International Building Co.,* 345 U. S. 502 (1953); *United States* v. *Parker,* 120 U. S. 89 (1887). The doctrine of *res judicata* precludes a court from modifying an antitrust consent judgment on the ground that it was erroneous when rendered. *Swift & Co.* v. *United States,* 276 U. S. 311 (1928); *United States* v. *Int. Harvester Co.,* 274 U. S. 693 (1927); see Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 YALE L. J. 1391 (1959).

The Federal Rules of Civil Procedure contain several provisions under which parties to final judgments may be relieved from their operation. See Rules 59 and 60, FRCP. Unless a litigant can fit himself within one of these provisions, the *res judicata* doctrine controls, for the Federal Rules are exclusive. Rule 60(b) Federal Rules of Civil Procedure. See 7 Moore's Federal Practice ¶60.26[4], ¶60.35[1] (1955 Ed.). Even a casual glance at the Rules, reveals no provision whereby a party may seek modification of a final judgment because it was erroneous when rendered. In fact, this Court, in *System Federation* v. *Wright,* 364 U. S. 642 (1961), has recently held that Rule 60(b) incorporates a consistent line of cases holding that a consent judgment can be modified only upon a showing of changed circumstances of fact or law which make the continued

operation of the decree inequitable. *E.g. Swift & Co.* v. *United States, supra; United States* v. *Swift & Co.*, 286 U. S. 106 (1932); *Western Union Tel Co.* v. *International Brotherhood*, 133 F. 2d 955 (7th Cir. 1943); *Coca-Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788 (10th Cir. 1943). See Dabney, *supra*, 68 YALE L. J. at 1347.

There was no showing in the District Court of any new factual circumstances which would make continued operation of the decree inequitable. On the contrary, Columbia's uncontradicted affidavit showed that the relevant factual circumstances are the same now as they were at the time of entry of the Final Judgment. There was no claim, and the District Court did not find, that any change had occurred in the law which made necessary a modification of the decree. Indeed the District Court failed to deal in either of its two opinions with the fundamental question of whether it had the power under the circumstances to modify the Final Judgment by declaring it illegal in part.

The District Court's action is completely contrary to the long-established decisions of this Court and raises questions of fundamental importance to the enforcement of the antitrust laws. Approximately 75 per cent of all civil cases brought by the Government under the Sherman Act are settled by consent judgments. The District Court's decision undermines the right of parties to consent judgments to rely on those judgments as *res judicata* subject to change only by unforeseen circumstances which would make the continued operation of the judgment inequitable. It is likely that antitrust litigants will be deterred from entering into consent judgments and any aid which these decrees provide in enforcing the antitrust laws may be lost. Of necessity, considerable uncertainty will be cast on the many consent decrees now operative.

Further, the "petition for modification" here may be construed to have been made under Rule 60(b). See *Sunbeam Corp.* v. *Charles Appliances,* 119 F. Supp. 492 (S. D. N. Y. 1953). If so, the opinion of the court below would have the effect of extending that Rule far beyond its present limits, and is likely to inject great uncertainty into its operation. The decision of the District Court should be reversed.

The Second Question is Substantial.

Assuming *arguendo* and contrary to fact and law that the District Court had the power to consider *de novo* the legality of the Final Judgment, it nevertheless erred in holding the decree in part illegal without a hearing. This Court has held that a consent judgment may not be modified without an evidentiary hearing. *Hughes* v. *United States,* 342 U. S. 353 (1952); *Liquid Carbonic Corp.* v. *United States,* 350 U. S. 869 (1955). And, this Court has cautioned against the use of summary judgment in complex antitrust matters. *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464 (1962). It has also cautioned against the application of a *per se* rule to a new and unique set of circumstances without an examination of the facts to determine the actual impact on competition. *White Motor Co.* v. *United States,* 372 U. S. 253 (1963).

In holding Columbia's contract provision to be *per se* illegal, the District Court relied on *Dr. Miles Medical Co.* v. *John D. Park & Son Co.,* 220 U. S. 373 (1911). The rationale of *Dr. Miles* is that an agreement for resale price maintenance is illegal because once a seller has parted with title to a commodity and it has passed into the normal channels of trade, that seller should not be able to restrain free competition among dealers in that commodity. But,

as a hearing on the facts would have shown, the rationale of *Dr. Miles* is inapplicable to the unique facts of this case.

In essence, the District Court equated the sale of an artist's services with that of a tube of toothpaste. It does not matter to a tube of toothpaste how much is charged for its sale. But it is crucially relevant to an artist how much is charged for his services because an artist's established fee is intimately related to, and, in part, comprises that artist's reputation. He may be severely damaged if he is used as a loss-leader or a year-end sale. Simply put, the artist's traditional and deeply felt concern for obtaining his established fee reflects a desire to prevent trafficking in his reputation. And, an artist's reputation is essential to his professional advancement. *Dr. Miles* should not be stretched to the point where it permits indiscriminate trafficking in artists' reputations and the possible destruction of their professional careers.

Before striking down as *per se* illegal a practice which has for years permeated a unique industry, the District Court should have held a hearing to ascertain the factual setting for the practice and its actual impact on competition. Instead, the District Court chose to theorize and, as a result, misapplied the *Dr. Miles* rationale. This Court should remand for a full hearing on the merits.*

The Third Question is Substantial.

Assuming *arguendo* and contrary to fact and law that the District Court had the power to modify the Final Judgment in the absence of any showing of a change in

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* The District Court's opinion on reargument implies that Columbia did not request a hearing. On the reargument, however, counsel for Columbia said: "On the issue of legality . . . there would be a necessity for a hearing because we raised issues of fact."

circumstances which made its continued operation inequitable, and that the District Court was correct in finding, without a hearing on the facts, that Columbia's contract provision was *per se* illegal, the District Court should have granted Columbia's motion to vacate the judgment instead of letting it stand as modified. Consent decrees are based on consent. Courts therefore will not require parties to sign them, *United States* v. *Ward Baking Co.*, 11 L. E. 2d 743 (1964); *United States* v. *Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio 1940), and are reluctant to alter them substantially without the parties' agreement. *Artvale Inc.* v. *Rugby Fabrics Corp.*, 303 F. 2d 283 (2nd Cir. 1962); *May* v. *Moss*, 194 F. 2d 133 (8th Cir. 1952), *cert. denied*, 343 U. S. 952 (1952); *Steingruber* v. *Johnson*, 35 F. Supp. 662 (M. D. Tenn. 1940); See *Anno.* 139 ALR 421. In this case the District Court declared illegal a practice which is an integral part of the concert service industry, and which consequently permeated a substantial portion of the Final Judgment. Columbia would not have consented to a decree differing with respect to the provisions for the artist's established fee from that to which it agreed in 1955, but would have contested the action in a full-dress law suit. The judgment as now modified does not reflect the consent of the parties bound by it. It is no longer a consent judgment and justice requires that it be vacated.

In addition, the decree as modified is almost useless as a tool for enforcing the antitrust laws. This Court has said that an antitrust decree must be fashioned "in such way as to prevent future violations and eradicate existing evils. . . ." To accomplish this "[a] full exploration of facts is usually necessary." *Associated Press* v. *United States*, 326 U. S. 1, 22 (1945); see also *United States* v. *Ward Baking Co., supra.* In this case the District Court, without any exploration of the facts, struck down a

substantial part of a decree entered by consent by another judge nine years previously, and gave no consideration whatever to whether the remainder is a sufficiently clear guide for the parties and for the industry. This is hardly consistent with the directives of *Associated Press*. Its shortcomings are here clearly revealed for Columbia has been left in complete confusion as to what has been "eradicated" and what is allowed.

As an example, it will be recalled that the District Court stated in its first opinion that ". . . Summy-Birchard may charge its audience associations [for artists] whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance. . . ." (App. A p. 12). Assuming an artist has an established fee of $1,000, but Summy-Birchard (or, more properly, Civic, its subsidiary concert service) uses the artist as a loss leader and charges audience associations $750 for that artist's performance while paying $1,000 (less margin) to the artist, the following questions, among others, are raised:

1. It may be that one of Community's audience associations would inform Community that it wishes to engage the artist at the $750 fee paid by Civic's audience associations and that if the artist is not made available at that price, a Summy-Birchard artist will be engaged. If Columbia agrees to the $750 price, does it violate Paragraph VI(C) of the decree which prohibits it from offering any artist managed by it " . . . to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by [Columbia]"? If, on the other hand, Columbia refuses, does it violate Paragraph VI(A) which prohibits it from refusing to make available an artist managed by it ". . . to any financially responsible audience association at

the same fee charged by such artist to comparable audience associations . . .''? (App. B p. 27).

2. If the artist informs Columbia that he will not appear if the audience association is charged $750, even though he may receive the full $1,000 (less margin), what is Columbia's obligation? Must Columbia inform the artist that he is obliged to appear for $750 so long as he receives $1,000 (less margin) because under the District Court's opinion Summy-Birchard and not the artist determines the price to be paid by the audience association? Or, may Columbia inform Civic that it will not make the artist available? If Columbia informs Civic that it will not make the artist available even though the artist will receive $1,000 (less margin), does Columbia violate Paragraph VI(A) of the Final Judgment as now modified by the District Court?

In sum, the decree as it now stands is of no help to the parties and has thoroughly confused the industry. It should be vacated.

Further considerations deriving from the nature of a consent decree also dictate vacation of the judgment. A consent decree is not a contract, but is contractual in nature, *e.g. May* v. *Moss,* 212 F. 2d 400 (8th Cir. 1954); *Backus* v. *United States,* 59 F. 2d 242 (Ct. Cl. 1932), *cert. denied,* 288 U. S. 610 (1933); *United States* v. *Radio Corp. of America,* 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed,* 318 U. S. 796 (1943); *Watson* v. *United States,* 34 F. Supp. 777, 780 (M. D. N. C. 1940), being the product of bargaining between the parties. See Note, 63 Harv. L. Rev. 320 (1949). It has been frequently held that where an integral part of a contract is found violative of the antitrust laws the entire agreement will be struck down. *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric & Mfg. Co.,* 329 U. S. 402 (1947);

United States v. *Bayer Co.*, 135 F. Supp. 65, 73-74 (S. D. N. Y. 1955). This is because it is impossible for a court to visualize what the parties would have agreed to had they known that something of importance to both was illegal. See *United States* v. *Shubert*, 163 F. Supp. 123 (S. D. N. Y. 1958). The same reasoning applies here. The District Court is not qualified to construct a decree the parties would have consented to, particularly where there has been no hearing on the facts. It should have vacated the decree and left the parties at arms length.

Conclusion.

The questions presented here are substantial and appropriate to full briefing and oral argument before this Court.

Respectfully submitted,

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APPENDIX A.

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT, INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

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KUPFERMAN & PRICE, of New York, New York, Attorneys for Defendant Summy-Birchard, Inc., THEODORE KUPFERMAN, Esq., of Counsel.

Opinion.

TYLER, D. J.

This civil anti-trust action was brought by the government in this District on October 20, 1956. On the same date a consent decree ("decree") was executed and entered by the parties. Article IX of the decree retained jurisdiction of this court:

> "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

Pursuant to this Article, defendants Columbia Artists Management, Inc. ("Columbia") and its subsidiary, Community Concerts, Inc. ("Community"),[1] have petitioned for a construction of the decree.

The original action by the government was brought against Columbia and Community, and against National Concert and Artists Corporation ("National") and National's subsidiary Civic Concert Service, Incorporated ("Civic"). The business of National is now being carried on by the Summy-Birchard Company ("Summy-Birchard"), and the business of Civic is now being carried on by the Civic Concert Service division of Summy-Birchard. By the terms of Article III, Summy-Birchard, as National's and Civic's successor, is bound by the decree.

Columbia and Summy-Birchard are both large-scale managers of professional concert musicians. The business of Community and the Civic division of Summy-Birchard is that of organizing and maintaining local non-profit "audience associations" throughout the country. These

[1] Sometimes hereinafter referred to interchangeably as "Columbia".

associations provide forums for professional concert musicians, primarily in smaller cities, by setting up annual series of concerts financed by dues subscribed in advance. Community and Summy-Birchard make their profits on this operation by in effect obtaining a portion of each fee paid to a performer by one of the audience associations organized and maintained by them.

The consent decree entered in this court in 1955 provided that:

> "V. Civic and Community are each ordered and directed:
>
> "(A) To place an advertisement each year in an October issue of *Musical America,* or similar publication, informing managers that such defendant will furnish to all audience associations which it organizes or maintains the information submitted to it within the two months next succeeding publication, by any manager with respect to the general availability and established audience association fee of any artist managed by him who desires to perform before audience associations and agrees to allow to the defendant a margin equal to the customary margin allowed to such defendant by other artists with comparable fees;
>
> "(B) To furnish to each audience association which shall be organized or maintained by such defendant all information furnished to such defendant pursuant to subsection (A) of this Section V;
>
> * * * * * *
>
> "VI. Each defendant is enjoined and restrained from:
>
> "(A) Refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee charged by such artist to comparable audience associations

where the artist is reasonably available for the desired performance;

* * * * * *

"(C) Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;

"(D) Refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee;"

By the terms of the decree, then, Columbia as manager of a substantial number of artists must make such artists available, subject to the artists' approval, to concert services other than Community, including the Civic division of Summy-Birchard. In making them available, Columbia requires the concert service to sign a standard contract which, in effect, and in purported compliance with the decree, binds the taking concert service to pay the artist a certain number of dollars ("established fee" less "margin"), to charge the audience association a certain number of dollars ("established fee") and, in effect, to retain for itself the difference ("margin"). This results in an absence of price competition between Community and other concert services with respect to performances by artists managed by Columbia. The form contract in significant part is set forth in the margin.[2]

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[2] "COLUMBIA ARTISTS MANAGEMENT INC.

* * *

"AGREEMENT BETWEEN LOCAL MANAGER [the concert service] AND ARTIST

* * *

Opinion.

Columbia and Community have made this application for construction of the decree because of disputes which have arisen between them and Summy-Birchard. Summy-Birchard has informed Columbia that it considers the present contract required by Columbia of concert services as a prerequisite to obtaining Columbia-managed artists to constitute an illegal scheme to maintain resale prices. Summy-Birchard admittedly has continued to sign the contracts in order to get Columbia performers, but only "under protest". Moreover, Summy-Birchard has devised a new system of organizing and maintaining audience associations which, in its view, does not meet with such an objection. Under what is called its "modified selective plan" Summy-Birchard passes on to its audience associations the entire margin for each performer. Summy-Birchard takes its remuneration under its plan by charging each association a percentage of that association's total yearly billings. This percentage (12%) is currently much smaller than the standard margin fees set by Community.[3] Thus, it is said that the audience associations which operate under Summy-Birchard's new system are able to save substantial sums in presenting their desired concerts. Summy-Birchard makes up (at least in part) for this loss of income to it by sharply reducing the services provided by its field

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"TYPE OF ENGAGEMENT:

* * *

"The authority of Artist's Manager [Columbia] is limited by the agreement between Artist and Artist's Manager to arranging for performances by Artist at fees set forth in the schedule heretofore furnished to Local Manager.

"It is agreed that this contract for the appearance of (Name of Artist) is solely for the purposes of an engagement on the organized audience series in (Town) for (Dates) at the fee of $ per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained by the artist or his manager will void this contract."

[3] Columbia publishes an annual margin schedule in which margin works out to approximately one-third of the established fee.

representatives to the local associations. Summy-Birchard will still provide these omitted services if they are desired, but only for substantial direct fees or charges.

In practical effect, Summy-Birchard under its new plan would be compensated as a concert service by an audience association in an amount consisting of the reduced margin of 12% plus direct charges for specific services as required by the particular association in question, and not according to the margin currently used by Columbia—*i.e.*, approximately one-third of the artist's fee. This in turn might mean, as a practical matter, that audience associations which have difficulty in organizing and maintaining themselves would often have to pay more than under past practice, while audience associations which have little such difficulty would pay less.

Columbia maintains in its first claim that Summy-Birchard's Civic division as it operates under the modified selective plan is not a concert service within the scope of the decree; thus, as manager of a substantial number of musicians, Columbia has refused to make its clients available at the audience association rate to Summy-Birchard for engagements before audience associations operating under Summy-Birchard's new scheme.

Columbia thus asks this court to construe the decree so as to condone Columbia's continued refusal to deal with Summy-Birchard as a concert service when the latter operates under its modified plan and to approve Columbia's form of contract which it presently requires of concert services desiring the appearances of Columbia-managed artists.

The decree, of course, was consented to by Summy-Birchard's predecessor only eight years ago. Whatever this court may feel about the desirability of a decree which condemns this industry to a Procrustean bed, this is the bed which its members have made for themselves. The stability of judgments and the policy of law enforcement permitting anti-trust consent decrees dictate that, absent

extreme countervailing circumstances, they should be made to lie in it. Accordingly, in deciding whether Summy-Birchard is a concert service under the decree, I will not enter into a consideration of the minute details of the industry, but will proceed to construe the plain words of the decree, at least where they appear to be not inequitable or illegal, regarding the validity of Summy-Birchard's claim to be a concert service when operating under its modified plan.[4]

Article II of the Final Judgment contains the following definitions:

> "(F) 'Audience association' shall mean a non-profit association organized for the purpose of presenting concerts (normally a minimum of three in any season) in one locality, financed by membership dues subscribed in advance;
>
> "(G) 'Concert service' shall mean a person who is commercially engaged in organizing and maintaining audience associations and who, without charge to such associations, either himself acts as a field representative or supplies one or more field representatives for that purpose;
>
> * * * * * * *
>
> "(J) 'Margin' shall mean the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience assocations;"

It seems clear that a concert service which does not supply a field representative and supply substantial services without charge to its audience associations is not a

[4] The government takes the position here that Columbia and Community are correct in urging that Summy-Birchard, when operating under its modified plan, is not a concert service within the relevant provisions of the decree.

"concert service" under the decree and thus is not entitled to "margin" as defined therein. The fact that a portion of the margin, if allowed, would go to the audience associations, which could then hire firms, such as Summy-Birchard, to perform the services is irrelevant to the letter of the decree. Moreover, the decree does not in this area necessarily conflict with the law, although the prescribed scheme might be theoretically regarded as a step in effectuating the decree's apparent intent of putting the ultimate price for the artist's services into the control of the artist or the artist's manager, since it does not, of itself, require such price maintenance.

A more troublesome question is raised by Columbia and Community in the second claim of their petition. It stems from advices written to them by Summy-Birchard that the contracts which Columbia requires Summy-Birchard to enter into as a condition precedent to getting Columbia-managed performers are illegal, in the opinion of Summy-Birchard, under the Sherman Act as constituting a proscribed scheme to maintain resale prices. As indicated heretofore, Summy-Birchard has continued to sign the Columbia-Community contracts, but only "under protest". Columbia and Community ask this court to find that the contracts in question are not illegal, under the decree or otherwise.

The government has filed a memorandum urging that this dispute between the other parties is not one subject to the jurisdiction of the court. The government bases this contention upon the arguments that the dispute in reality does not arise from the consent decree, and so cannot properly be considered on an application for construction, and, moreover, that it is a sham dispute and so is not a case or controversy cognizable by the judicial power of the United States.

The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree clearly envisions that the

artist or his manager will be able to control the ultimate price paid by the "consumer"—audience association, impressario, or whoever assumes the risk of "producing" a show. Were this not so, the definition of "margin" in the decree would be meaningless. Since this court by its decree—albeit a consent order—has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system. On the other hand, it must be remembered that this action is one by Columbia to vindicate the *status quo*, not one by Summy-Birchard or the government to attack it. It is necessary to a proper working of an adversary judicial system that courts not entertain proceedings where there is no genuine dispute between opposing parties. This stricture has the dignity of a constitutional limitation upon the jurisdiction of federal courts. Summy-Birchard, then, must seriously maintain its contention of the contracts' illegality, in the sense that it cares enough about the question to affect its actions in order for this court to have jurisdiction. It is clear at this point, particularly by virtue of additional papers submitted and additional hearings held after the initial pleadings and argument, that Summy-Birchard does care enough about the question to make an adequate presentation of its case as an adversary. At least in the special circumstances of this case, in which the court has already retained jurisdiction to hear motions for construction of its decree and in which it appears that the legality of the decree, or at least of practices envisioned by or naturally flowing from the decree, is being questioned,[5] it would seem to be hypertechnical and time-consuming judicial administration to reject jurisdiction of this particular dispute just because Summy-Birchard has not filed a paper labeled "petition for declaratory judgment" or

[5] *Cf., United States* v. *Swift & Co.*, 286 U. S. 106, 114-115 (1932) ("[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.")

"petition for modification", particularly if substantially the same facts and arguments to be raised by such putative formal pleadings are now before the court.

Summy-Birchard has contended here that a concert service "buys" an artist's services and "resells" them to the audience associations. If this be so, there is a scheme or system effectuated through the "sales" contracts between the artist or his manager and the concert service to control the price at which the concert service can sell the artist's performance to an audience association. Such a scheme would be illegal *per se* under section 1 of the Sherman Act (15 U. S. C. §1)[6] since it does not fall within the "trademarked product" exception created by the Miller-Tydings and McGuire amendments to that Act (15 U. S. C. §1).

But if a concert service is no more than an agent, either of the artist or of the artist's manager or of the audience association, there is of course no "sale" and no illegal pattern which falls afoul of the Sherman Act.[7]

Certain conceptual difficulties might be said to arise from the fact that the subject of the sale or agency is an artist's performance (or contract to perform) at a unique time and place, whereas most of the adjudicated cases involving questions of resale price maintenance deal with relatively fungible "physical" products. But if there is a regular and established market for services, no matter how unique such may be in certain aspects, the existence of a market for them in which they are to a large extent interchangeable engenders a trade of which there can be illegal restraints within the ambit of the Sherman Act. That there is such a market for artists' concerts before audience associations is clearly established from the existence as well as from the words of the consent decree, and from the present pleadings and papers of all the parties.

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[6] *Dr. Miles Medical Co.* v. *John D. Park & Son Co.*, 220 U. S. 373 (1911).

[7] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

I conclude, therefore, that this trade can be illegally restrained through resale price maintenance.

It is plain that the concert services are not agents of the audience associations under the present scheme, since their fee ("margin") is admittedly not bargained for or set by the audience associations.

It is more difficult to determine whether the concert services are agents of the artists or of the artists' managers. Columbia and Community stoutly maintain that their fees are set by these parties in accordance with the decree. Summy-Birchard, however, has submitted in an affidavit a schedule published by Community showing a fixed series of margin rates to which all performers booked through them are apparently subject. The accuracy of this document has not been questioned. The practical effect of this practice is that Community (the dominant firm in the industry) dictates to the artists the percentage it will take of their fees if they play before any of the Community-serviced audience associations. Community then turns around and requires its audience associations to pay the full "established price" of the artists. And further, as a condition to making its artists available to Summy-Birchard and other concert services, Community's parent Columbia enforces the same standard of behavior upon its competitors.[8] In doing this Columbia is materially aided by the decree, as may be seen by the invalidity of Summy-Birchard's modified selective plan. That plan, if proper under the decree, would, of course, obviate this problem.

Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid.

Invalidation of such part of the consent decree does not mean, however, that when Summy-Birchard books Colum-

[8] *Cf. United States* v. *Masonite Corp.*, 316 U. S. 265 (1942).

bia-managed artists for engagements before audience associations with which it deals on the basis of directly charging the associations for field representatives or other ordinary expenses of establishing and maintaining the associations, Columbia must allow a deduction of margin from the artists' established price. For the reasons advanced earlier, I will not relieve the parties to the decree from complying with that judgment save where it is patently void. Thus, Summy-Birchard may charge its audience associations whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance, but Columbia need not give Summy-Birchard the margin or "price cut" given concert services under the decree unless Summy-Birchard provides the requisite services to fulfill the decree's definition of a concert service.

The request for a construction of the decree approving Columbia's refusal to give Summy-Birchard margin when it operates under its modified plan (Claim I) is granted. The request for a construction approving Columbia's contracts with concert services (Claim II) is denied.

There remains open one collateral issue raised by Columbia in Claim I of its petition. As part of its prayer for relief under that Claim, Columbia has requested a direction that Summy-Birchard or Civic return to Columbia "as trustee" certain moneys deducted by Civic as margin in connection with performances of Columbia-managed artists before audience associations with which Civic dealt under the so-called Summy-Birchard modified selective plan. In view of this court's disposition of the main thrust of Claim I in Columbia's favor, it is at least theoretically possible that Civic should be required to return such moneys. The record is unclear and incomplete as to what amounts might be due and owing. Moreover, the parties at one point during the hearings seemed to agree that if Columbia were upheld on Claim I, a stipulation as to amount could be easily worked out. Accordingly, unless and until advised to

the contrary, I will assume that provision for this issue can be agreed upon at the settlement of a final order.

Indeed, an order encompassing all of the foregoing matters should be settled on notice.

Dated: New York, N. Y.
November 19, 1963.

s/ H. R. Tyler, Jr.
U. S. D. J.

Memorandum.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT-SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

TYLER, D. J.

The motion of Columbia Artists Management Inc., and Community Concerts, Inc., for reargument is granted for the purpose of determining whether an evidentiary hearing should be had on the following question: Whether Community Concerts, Inc., be in such agency relationship with the audience association it organizes and maintains as to preclude its resale of artists' services to them, and so to preclude resale price maintenance under the rationale of *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

Hearing of the reargument will be held at 4:00 p.m. on January 27, 1964, in court room No. 1106. Affidavits and memoranda will be accepted at that time.

/s/ H. R. TYLER, J.
U. S. D. J.

January 14, 1964.

Opinion On Reargument.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT, INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

JOHN J. GALGAY, Esq., LOUIS PERLMUTTER, Esq., and WILLIAM D. KILGORE, JR., Esq., Attorneys, Department of Justice, for Plaintiff.

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RALPH F. COLIN, Esq., SEYMOUR D. LEWIS, Esq., GILBERT S. EDELSON, Esq., HAROLD S. LEVY, Esq., of Counsel.

KUPFERMAN & PRICE, of New York, New York Attorneys for Defendant Summy-Birchard, Inc., THEODORE KUPFERMAN, Esq., of Counsel.

TYLER, D. J.

The thrust and context of this motion for reargument filed by defendants Columbia Artists Management, Inc. and

Community Concerts, Inc. can best be illustrated by a precis of the history of this anti-trust litigation to date.

On October 20, 1955, the United States filed a criminal information and a civil complaint against Columbia and its wholly owned subsidiary Community Concerts, Inc. (collectively referred to as "Columbia" hereafter), against National Concert and Artists Corporation and its subsidiary Civic Concert Service, Inc. (predecessors of Summy-Birchard Inc. and hereafter referred to as "Summy-Birchard"), and against certain individuals. On the same day the information was answered with pleas of *nolo contendere*, fines totaling $16,000 were imposed, and answers and a consent decree were filed.

On July 26, 1963, Columbia petitioned for a construction of this decree regarding two points. First, Columbia sought court approval for not treating Summy-Birchard as a concert service entitled to margin under the decree when Summy-Birchard operated under its "modified selective plan". After several arguments and hearings in the summer and fall of 1963, the court gave in its opinion of November 19, 1963 in which Columbia's first claim or request was in substance granted. Second, Columbia urged the court to find and rule that a standard contract provision used by them in "selling" performances to other contract services was proper under the decree. This the court refused to do in its same opinion of November 19. Thereafter, upon the motion of Columbia, limited reargument was granted with respect to this second part of its opinion, and further papers were submitted and extensive argument was had on several occasions upon this portion of the opinion, not only on the question of agency, on which the court had directed reargument, but on the question of whether there was a legitimate controversy before the court which would confer upon it jurisdiction.

In its second request for construction, Columbia alleged that Summy-Birchard had advised it in writing that a provision in Columbia's form contract constituted illegal

resale price maintenance, and that Summy-Birchard would only sign contracts containing such a clause "under protest". In its original answering papers before this court, Summy-Birchard affirmed its position that Columbia was forcing it into illegal resale-price maintenance contracts, and asked that the parent company, Columbia Artists Management, Inc., be prohibited, under the decree, from engaging further in the concert service business through its subsidiary Community Concerts, Inc. or otherwise.

In its original papers in answer to Columbia's construction petition, the Department of Justice had not taken a position in this phase of the dispute, maintaining it to be a sham controversy and so not within the jurisdiction of the court, at least until this court rendered its opinion of November 19, in which it found jurisdiction.

During hearings on Columbia's motion for reargument, it became evident that Summy-Birchard was no longer seriously attacking the contract provision; having made its point in effect with regard to the second claim for construction by Columbia, it now let it be known that it would not seriously object if the court reversed itself on reargument. The government, however, by the time of the second hearing on reargument, had come to the support of Summy-Birchard's original charge of resale price maintenance, and had abandoned its position that the court did not have jurisdiction.

One practical result of this elaborate minuet is that, throughout, there have been adversary parties, albeit not the same ones, engaged in a real dispute. The fact that, after reading the original opinion rendered by this court, Summy-Birchard decided to virtually abandon its original position should not be used to read back a lack of adversary parties before the opinion, both because of the weakness in logic of such an argument, and because it would undermine the duty of fair dealing owed by the parties and their attorneys to the court. In any event, there is currently an adversary situation with a real dispute between the govern-

ment and Columbia; indeed, it can be argued that what went on before is not crucially relevant to the question of whether there is now genuine opposition to Columbia's motion for construction.[1]

Proceeding to the question of agency, which provided the substantial original basis for the reargument, the situation as set forth by Columbia appears to be that an audience association, in exchange for the promise of a concert service to organize and maintain it, agrees to take its requirements for performers through the concert service. To debate in the abstract whether it is proper in this situation to call the concert service the "exclusive booking agent" of the audience association, as apparently been the practice in the industry, misses the point.

The significant point is that the services of artists are being sold by their manager Columbia. The question is whether Columbia can dictate or interfere in the financial arrangements between Summy-Birchard, which as a concert service arranges for the ultimate purchase of such services by an audience association, and the audience association. Whether these "arrangements" are called "purchases and resales", or "agency", or something else, is largely irrelevant. To permit a prior seller to dictate the terms between two subsequent parties, neither of which is in the kind of an agency relationship *with the prior seller* which was found and sanctioned in the *General Electric*[2] case, clearly would be to permit a combination in restraint of trade forbidden by the Sherman Act.

Not only is trade restrained in the narrow scope of pricing arrangements between Summy-Birchard and the audience association forbidden by the *Dr. Miles*[3] rule, but

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[1] Indeed, Columbia's counsel has argued consistently and to the end that there is still a substantial controversy between it and Summy-Birchard on the second claim for construction (SM 17 et seq. February 4, 1964).

[2] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

[3] *Dr. Miles Medical Co.* v. *John D. Park & Son Co.*, 220 U. S. 373 (1911).

in a wider area also, as was noted in the November 19 opinion by this court. Columbia not only manages a large number of the performers in the trade, but through its own concert service offers performers to audience associations. Under the existing system of contractural restraints, Columbia's concert service in effect can charge what it pleases for making arrangements with audience associations for Columbia-managed performers, secure in the knowledge that its competitor Summy-Birchard cannot charge less for the same performers and so induce Columbia-maintained audience associations to come into Summy-Birchard's fold. This aspect of trade restraint would be a *per se* violation even if the "produce" were trademarked and the resale price maintainance were thus brought within the protection of the McGuire Act.[4] *United States* v. *McKesson and Robbins*, 351 U. S. 305 (1956).

In its motion for reargument, Columbia cites *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), in which summary judgment was held an inadequate vehicle to establish the illegality under the Sherman Act of a novel question of territorial allocation. That the *White* opinion was not designed to affect the validity of *Dr. Miles*, even when the latter decision is applied to novel "products", is apparent from the reaffirmation of the *per se* rule against resale price maintenance at page 260 of the opinion. *White*, therefore, does not appear to be persuasive authority to hold any evidenciary (sic) hearings in this case.[5]

In any event, on Columbia's own statement of the facts, and accepting as true the facts—albeit not the legal conclusions—stated in the affidavit of Columbia vice-president Richard Yarnall which was submitted on reargument, it

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[4] 15 U. S. C. §45.

[5] To the extent this court views the problem as essentially one of construction, it could be argued that counsel for Columbia in effect conceded at the last hearing on reargument that there are no additional facts to be adduced which would bear significantly on the issue. (SM 15-16, February 4, 1964).

seems clear that the contractual clause is a *per se* violation of the Sherman Act which this court cannot and will not sanction even to the extent of finding it in conformity with the consent decree.

The opinion of November 19 is accordingly reaffirmed. An order should be settled as directed in that earlier opinion.

Dated: New York, N. Y.
April 3, 1964.

H. R. TYLER, JR.,
U. S. D. J.

Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, v. COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, & SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

The defendants Columbia Artists Management Inc. ("Columbia") and Community Concerts, Inc., ("Community") having filed a petition on July 18, 1963 for orders and directions for the construction of the Final Judgment entered herein on October 22, 1955 which petition sets forth Claims I and II and the defendant Summy-Birchard, Inc., ("Summy-Birchard") having filed its answer to the said petition, and the United States having appeared herein and the Court, after hearing all the parties rendered its opinion dated November 19, 1963 granting Columbia's Claim I and denying Columbia's Claim II, and Columbia having moved for reargument of so much of the Court's opinion which denied Claim II, and the Court having granted reargument and after hearing all the parties rendered its opinion on April 3, 1964 reaffirming its opinion of November 19, 1963, it is

Order.

ORDERED, ADJUDGED AND DECREED:

1. With respect to Claim I, that where Summy-Birchard, through its division, Civic Concert Service, or otherwise, and an audience association enter into an agreement known as the "Selective Plan" (Petition, Exhibit B) or any other plan substantially the same, Summy-Birchard does not act as a concert service, as defined in paragraph II(G) of the Final Judgment herein for that audience association and Columbia does not violate any provision of the Final Judgment when it refuses to permit Summy-Birchard, or the entity through which it acts to deduct the portion of an artist's fee known as "margin" when the artist is engaged for an appearance before such audience association.

2. The Court has jurisdiction to determine the issues raised by Claim II. The provision in Columbia's contract (Petition, Exhibit D) that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. §1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid.

Dated: June 11, 1964.

H. R. TYLER, JR.
United States District Judge

APPENDIX B.

Final Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *vs.* COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants.	Civil Action. No. 104-165

The plaintiff, United States of America, having filed its complaint herein on Oct. 20, 1955, and the defendants herein having appeared and filed their answers to the complaint denying the substantive allegations thereof; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issues;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I.

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint herein states

a claim upon which relief could be granted against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "National" shall mean defendant National Concert and Artists Corporation, a New York corporation;

(B) "Civic" shall mean defendant Civic Concert Service, Incorporated, a New York corporation;

(C) "Columbia" shall mean defendant Columbia Artists Management Inc., a New York Corporation;

(D) "Community" shall mean defendant Community Concerts Inc., a New York corporation;

(E) "Artist" shall mean a concert, recital, oratorio, opera or ballet artist or attraction;

(F) "Audience association" shall mean a non-profit association organized for the purpose of presenting concerts (normally a minimum of three in any season) in one locality, financed by membership dues subscribed in advance;

(G) "Concert service" shall mean a person who is commercially engaged in organizing and maintaining audience associations and who, without charge to such associations, either himself acts as a field representative or supplies one or more field representatives for that purpose;

(H) "Manager" shall mean a person who, for a commission, arranges for the performances of an artist or represents or otherwise acts as agent for an artist in connection with performances by such artist;

(I) "Local manager" shall mean a person, other than an audience association, engaged in presenting concerts;

(J) "Margin" shall mean the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience associations;

(K) "Person" shall mean an individual, partnership, firm, corporation, association or other business or legal entity.

III.

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors and assigns and to each of its officers, directors, agents, employees and to all other persons acting under, through or for such defendant.

IV.

Each defendant is enjoined and restrained from combining or conspiring, or from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program with any other defendant or any other person to:

(A) Allocate or divide territories or markets or otherwise refrain from competition, or leave any person free from competition, in any territory, field or market in the organization or maintenance of audience associations;

(B) Exclude any person from, or refrain or limit any person in, the organization or maintenance of audience associations or the management of artists; or

(C) Refrain from competition, or leave any person free from competition for the management of artists.

V.

Civic and Community are each ordered and directed:

(A) To place an advertisement each year in an October issue of *Musical America*, or similar publication, informing managers that such defendant will furnish to all audience associations which it organizes or maintains the information submitted to it within the two months next succeeding publication, by any manager with respect to the general availability and established audience association fee of any artist managed by him who desires to perform before audience associations and agrees to allow to the defendant a margin equal to the customary margin allowed to such defendant by other artists with comparable fees;

(B) To furnish to each audience association which shall be organized or maintained by such defendant all information furnished to such defendant pursuant to subsection (A) of this Section V;

(C) To prepare and maintain, annually for ten years after entry of this Final Judgment, records as to each audience association organized and maintained by such defendant which shall have scheduled a membership campaign, such records to contain the names and addresses of the president and correspondent of the association and, within ten days after it is set, the date when the membership campaign is scheduled to be held;

(D) To maintain and make available the above records at its principal office, on at least one day per week during regular business hours, for inspection and copying by any manager, or his authorized agent, who has submitted information to the defendant pursuant to subsection (A) hereof, and who will agree (1) to keep confidential the information obtained from the records, (2) to use such information only in connection with artists as to whom information has been submitted to such defendant pursuant to subsection (A) above, and (3) to advise such defendant, prior to offering

his artist to any audience association organized or maintained by such defendant at a fee less than that artist's established f e, that such defendant is authorized to offer said artist at the lower fee;

(E) To use its best efforts to obtain for any audience association organized or maintained by such defendant any artist selected by such association and as to whom information was furnished to such defendant pursuant to subsection (A) hereof and to execute an agreement for the performance of such artist without any delay after completion of the membership campaign and after determining the availability of the artist and obtaining the necessary authority from the artists or his manager.

VI.

Each defendant is enjoined and restrained from:

(A) Refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee charged by such artist to comparable audience associations where the artist is reasonably available for the desired performance;

(B) Knowingly misrepresenting to any audience association or concert service the fee, availability, reliability or reputation of any artist;

(C) Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;

(D) Refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee;

(E) Making available the service of any artist on the condition that the service of any other artist be contracted for;

(F) Conditioning the organization of any audience association upon the agreement or understanding that the association present a specified number of concerts in excess of three;

(G) Requiring, directly or indirectly, that any reasonably available artist not perform before any audience association not organized by such defendant or its affiliate;

(H) Acquiring, directly or indirectly, any of the assets, business or good will of, or stock or other financial interest in, any concert service, unless such defendant shall upon reasonable notice to the plaintiff, show to the satisfaction of this Court that such acquisition may not tend to restrain or lessen competition in the business of organizing audience associations in any section of the United States.

(I) Preventing, or attempting to prevent, any manager giving information to such defendant pursuant to subsection (A) of Section V herein from meeting with any audience association to discuss artists to be engaged by such association.

VII.

It being the purpose of this Final Judgment to facilitate and increase the booking of independently managed artists by audience associations organized or maintained by any of the defendants and to promote competition between defendants and between and among independent managers and defendants in the management of artists, the plaintiff may at any time after five years from the date of entry of this Final Judgment petition this court to determine whether such purposes have been achieved and, if the Court is satisfied that such purposes have not been achieved, the defendants shall be prohibited, upon such

terms as the Court may deem appropriate, from engaging in the concert service business.

VIII.

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege,

(a) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and

(b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present regarding any such matters.

For the purpose of securing compliance with this Final Judgment, the defendants, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

Final Judgment.

IX.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof.

SIDNEY SUGARMAN
United States District Judge

Dated Oct. 20, 1955.

We hereby consent to the making and entry of this Final Judgment:

For the Plaintiff:

/s/ STANLEY N. BARNES
Assistant Attorney General

/s/ RICHARD B. O'DONNELL

/s/ W. D. KILGORE, JR.

/s/ HARRY C. SKLARSKY

/s/ WORTH ROWLEY

/s/ LOUIS PERLMUTTER

/s/ FRANCIS E. DUGAN

For the Defendants:

Columbia Artists Management Inc.

National Concert and Artists Corporation

Community Concerts Inc.

Civic Concert Service, Incorporated

CRAVATH, SWAINE & MOORE
GEORGE B. TURNER

CRAVATH, SWAINE & MOORE

By GEORGE B. TURNER,
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McALOON & HIRSCHBERG
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By NATHAN HIRSCHBERG,
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 775

COLUMBIA ARTISTS MANAGEMENT INC. AND COMMUNITY CONCERTS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

This is a direct appeal from an order (J.S. A-21-22) of the district court entered in response to appellants' petition for construction of a consent judgment in a government civil antitrust case. The judgment was entered on October 20, 1955, in a suit

which charged appellants Columbia Artists Management Inc. ("Columbia") and its wholly-owned subsidiary Community Concerts, Inc. ("Community"), and appellees National Concert and Artists Corporation ("National") and its wholly-owned subsidiary, Civic Concert Service, Incorporated ("Civic"), with violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).[1] Appellee Summy-Birchard, Inc., the successor to National and Civic, is bound by the decree and participated in the proceeding below.

Columbia and Summy-Birchard are managers of professional concert artists. Their respective concert service affiliates (Community and Summy-Birchard's Civic Concert Service Division) are engaged in organizing and maintaining in cities throughout the country local non-profit "audience associations" which sponsor concert series. The complaint charged (Par. 20) a combination and conspiracy to monopolize and restrain interstate commerce in the management and booking of concert artists and in the formation and maintenance of organized audience associations. Among the alleged effects of the violations charged were: audience associations were deprived of access to concert artists not controlled by the defendants, independent concert services were excluded from the business, and artists were compelled to subject themselves to the management and control of the defendants in order to obtain adequate bookings (Par. 24).

---

[1] In a companion criminal case charging the same offenses, the defendants pleaded *nolo contendere* (J.S. A-16).

Paragraph VI(D) of the consent judgment requires that each defendant make available "to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee" (J.S. A-4). As defined in the judgment, a "concert service" is an organization that provides field representatives without charge to the audience association (Para. II(G), J.S. A-24), an "audience association" is a nonprofit association "organized for the purpose of presenting concerts * * * financed by membership dues subscribed in advance" (Para. II(F), J.S. A-24) and the "margin" is the portion of "an artist's established fee" which the concert service is authorized to retain as compensation for its services (Para II(J), J.S. A-25).

In making its concert artists available to Summy-Birchard pursuant to Paragraph VI(D) of the decree, Columbia has required Summy-Birchard to sign a standard contract under which the concert service must charge the audience association a designated fee and pay the artist a lower designated fee (J.S. A-4 - A-5). Summy-Birchard protested that this contract "constitute[s] an illegal scheme to maintain resale prices" because its effect is to eliminate price competition "between Community and other concert services with respect to performances by artists managed by Columbia," and signed it "under protest" (*ibid*). Columbia and Community then filed in the district court a petition for a construction of the con-

sent judgment. Insofar as is here relevant,[2] they sought a determination that the contract is not illegal under the decree or otherwise (J.S. A-8). In a supporting memorandum, the appellants urged that if the court were to rule that the decree does not sanction the contract, the court should then determine its validity under the Sherman Act (Memorandum of Columbia Artists Management, Inc., in Support of its Petition for Construction of the Final Judgment of October 20, 1955, Points II-B, III; J.S. A-8).

After hearing argument and re-argument, the district court held that the decree does not sanction the contract. The court's order states (J.S. A-22):

> The provision in Columbia's contract * * * that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid.[3]

---

[2] The appellants also sought a ruling that Summy-Birchard, under its new system of organizing and maintaining audience associations, did not constitute a "concert service" as defined in the judgment, and that Columbia therefore was not required to furnish it with concert artists pursuant to paragraph VI (D). The district court so ruled (J.S. A-22), and Summy-Birchard did not appeal therefrom.

[3] Although on the original argument Summy-Birchard contended that the contract was illegal, it abandoned that con-

ARGUMENT

Appellants' attacks on the district court's order all assume that the net effect of the proceeding below was to modify the consent judgment. We submit that the assumption is unwarranted. Despite some ambiguous expressions in the opinions, the effect of the district court's action is not to change the consent judgment when properly construed and its order does not constitute a modification. In our view appellants have been subjected to no obligations not previously imposed by the judgment, and they have been deprived of no privilege. Consequently, the three questions posed by appellants are not raised for argument. The only question which the appeal would actually present is the meaning of a particular decree in a narrow and currently unimportant application. Moreover, the construction put upon the decree by the proceedings below seems plainly correct whatever the merits of the course by which the district court reached that conclusion.

1. The critical paragraph in the consent decree enjoined appellants (J.S. A-27)—

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tention on reargument. The United States, which originally had urged that the court had no jurisdiction to decide the issue because the decree does not deal with price fixing, reversed its position on reargument and urged the court to determine that the decree does not sanction the contract. Since the United States thus became one of the adversary parties on this issue in the district court, we agree with the appellants that the appeal properly lies to this Court rather than to the court of appeals. Cf. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39, 40.

> from refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, *at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee.* [Emphasis added.]

Appellant Columbia, as manager, thereafter refused to make artists available except under a standard form agreement. The agreement in effect required a concert service to charge the audience association (the "consumer") the artist's "established fee" and allowed the concert service the same "margin" out of the fee enjoyed by appellant. Those terms were sanctioned by the decree. Appellant Columbia also imposed as a condition of making an artist available the additional requirement that the concert service agree to retain the full margin for itself (J.S. A-4-5) instead of reducing the net cost to audience associations by rebating all or a part of the margin, as Summy-Birchard apparently was willing to do. When Summy-Birchard challenged the legality of this additional requirement, appellants instituted the present proceeding seeking a judicial determination: (1) that its practice not only did not violate but was affirmatively sanctioned by the consent judgment, and alternatively (2) that the practice, if not affected by the decree, was nevertheless lawful. The district court ruled against appellants on both points.

2. The first question obviously deals only with the interpretation of the consent decree. The rationale of

the critical paragraph, quoted above, is clear enough. Appellants had been charged with monopolizing the business of furnishing performing artists to audience associations. The aim of the decree was to open up to others all aspects of the business of arranging concerts by performing artists through audience associations. Thus, the appellant concert service ~~Civic~~ Community was required to deal with managers other than appellant Columbia on equal terms, and appellant Columbia, as manager, was required to do business with concert services other than its affiliate Community without discrimination. It is also apparent that the judgment was drafted upon the theory that each artist had an "established fee" out of which would be paid the commission of his manager and the "margin" of the concert service. Accepting that predicate, one of the purposes of the judgment was to bar the appellants from discriminating in setting the fees and margins for particular concerts in such a way as to preserve their monopolistic position and defeat the purpose of opening up the business to others. Parts V and VI of the consent judgment contain a number of such provisions (J.S. A-27, A-28). The critical words in Part VI(D) requiring appellants to make artists available to rival concert services—

> at the same margin allowed to the defendant or its affiliated concert service

obviously were intended to serve the purpose of preventing Columbia from discriminating against concert services other than its affiliates by refusing to allow them as high a margin for costs and expenses

as its affiliates.[4] Since the draftsmen were concentrating on preventing discrimination against unaffiliated concert services, there was little reason to be thinking of what the unaffiliated service might do with its margin or the possibility that the unaffiliated service would be willing to accept a lower net return than the affiliated service. That the consent judgment was not intended to bar such an arrangement is also indicated by the comparable provision in Part VI(A) which requires Columbia, as manager, to make an artist available "at the same fee" charged when the concert is arranged by organizations affiliated with appellants; certainly no one supposed that this provision left appellants free to refuse to make an artist available when the local audience association wished to pay a fee higher than that normally charged by the artist.

In any event, what the unaffiliated service does with its margin once received is obviously irrelevant to any of the problems of opening up the business and preventing discrimination. They are the problems with which the consent judgment is concerned. To read into the words "at the same margin" an intent to freeze the margin in the hands of the concert service and bar it from offering its services at a lower cost

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[4] A possible additional reason for the draftsmen's use of the words "at the same margin" is the risk that Columbia might take a higher margin out of the performer's established fee for an unaffiliated concert service in order to discourage performers from accepting engagements arranged through unaffiliated services. This explanation, however, seems unlikely.

to the audience associations than ~~appellant's~~ Columbia's services by rebating a portion of the margin would not only go beyond any of the problems revealed by the complaint but would give the decree the effect of eliminating a lively source of competition—the concert service willing to arrange concerts for a lower charge than appellants were making.

3. Were there any ambiguity in the clause in question, it would be relevant to consider which of the alternative constructions conforms to other requirements of the Sherman Act. An antitrust decree must be presumed not to authorize violations of Section 1. The fact that appellants' construction of Part VI(D) would sanction illegal price-fixing whereas the construction suggested above would read the decree to conform to settled principles, is the strongest possible reason for giving the decree the latter interpretation.[5]

---

[5] The district court was correct in holding that appellant's standard form of agreement constituted illegal price-fixing under Section 1 of the Sherman Act. The effect of the contract was to eliminate price competition between concert services in terms of their charge for arranging engagements by performing artists, *i.e.* Columbia was fixing the fee received by the concert services. From the standpoint of appellants it was not improper to liken Summy-Birchard and other concert services to the "buyer" of an artist's performance which they would "resell" to the audience association and a reduction of the margin was in effect a "price-cut" on the resale. J.S. A-12; cf. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373; *United States* v. *McKesson & Robbins*, 351 U.S. 305.

Contrary to appellants' suggestion, there is no question here about the power of the performing artist to protect what he regards as his reputation by refusing to perform

4. It is not altogether clear whether the district court ultimately accepted or rejected the foregoing analysis. Its original opinion, we must acknowledge, seems to hold that the consent judgment authorized Columbia, as manager, "to control the ultimate price paid by the 'consumer'—audience association, impressario, or whoever assumes the risk of 'producing' a show" (J.S. A-9). Apparently the court was talking about the net cost to the associations. It then went on "to consider charges of illegality against the system" (*ibid*), and implied that it would relieve the parties from complying with the judgment "where it is patently void" (J.S. A-12).

On the other hand, even in that opinion the district court summarized its ruling upon appellants' two claims by granting the first and saying of the second (*ibid;* emphasis added):

> The request *for a construction* approving Columbia's contracts with concert services (Claim II) is denied.

---

when the cost to the audience association is less than his standard fee. One may wonder how it can possibly injure the artist for the audience association (and presumably the audience) to know that the concert service has reduced *its* allowance. But there is no need to speculate upon the point because Columbia, an agent or broker with an economic interest of its own, has no power to assert whatever privilege may be possessed by the performing artist himself with respect to the charge to the audience. Columbia, with its interests as manager and its affiliated interest as a concert service, is not acting solely in the artists' interests.

In the opinion on reargument the court again stated (J.S. A-16) that in the first opinion it had merely refused—

> to find and rule that a standard contract provision used by them [Columbia] in "selling" performances to other contract services was proper under the decree.

And it indicated in another passage that to some extent it viewed the problem "as essentially one of construction" (J.S. A-19, n. 5).

Similarly, the penultimate sentence in the opinion on reargument is at least susceptible of being read as an assertion that the court would not construe the consent decree as sanctioning a *per se* violation of the Sherman Act (J.S. A-20).

The order leaves the question open for it merely says that (J.S. A-22; emphasis added)—

> *To the extent* that the Final Judgment operates to allow Columbia to set such resale prices

it is illegal and void. This is hardly enough to indicate an affirmative opinion that the final judgment did authorize price-fixing.

5. Whatever the course by which its decision was reached, the order of the district court subjects appellants to no obligations not already imposed by the original consent judgment properly interpreted. The district court added no prohibition against "resale price-fixing" as such. The original decree left that question at large, just as it neither approved nor forbade other activities in which appellants might engage but which were not involved in the action. If

Columbia and concert services *voluntarily* execute the standard form agreement, the government cannot proceed by reason of that fact alone, against Columbia for violation of the decree but will be required to file either an original or supplemental bill charging violation of Section 1 of the Sherman Act. Nor can appellants complain that the district court ventured into an area not covered by the consent judgment; it was they who asked the district court to rule on the legality of such contracts even apart from the judgment.

Appellants are subject to citation for contempt if they refuse to make artists available to a financially-responsible concert service at the same margin allowed to their affiliated concert services except upon the condition that the unaffiliated service stipulate that it will return no part of its margin to the audience association. That practice would violate Part VI(D) of the consent judgment because it adds a new condition to those on which Part VI(D) requires Columbia to make artists available to unaffiliated concert services. Such was in fact the meaning of the judgment as originally entered, we contend, whether the district court supposed that it was modifying or merely construing Part VI(D).

The correct construction of the decree, even if fairly debatable, has only marginal significance. So far as we are aware or the record shows, Summy-Birchard was the only concert service desiring to return to audience associations part of the margin allowed by appellants. As stated in the opinion of the district court on reargument (J.S. A-17), Summy-Birchard

is apparently no longer seriously interested in pursuing that course of business.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted.

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No. 775

IN THE

Supreme Court of the United States

October Term, 1964

COLUMBIA ARTISTS MANAGEMENT INC. and COMMUNITY CONCERTS, INC.,

Appellants.

against

UNITED STATES OF AMERICA; SUMMY-BIRCHARD, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE SUMMY-BIRCHARD, INC.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE SUMMY-BIRCHARD, INC.

Statement

Summy-Birchard Company (incorrectly referred to in the caption as Summy-Birchard, Inc.) was not a party to the original proceedings which lead to the consent judgment of October 20, 1955. It acquired National Concert and Artists Corporation and Civic Concert Services Incorporated in 1961, or rather what remained of their operations, and is thus by the terms of the decree bound thereby.

It participated in the proceeding below, before Judge Tyler.

It may be termed a party to an alleged conspiracy only in the sense that it is forced to partake to avoid being an innocent bystander.

Argument

In the present posture of the industry in which Columbia is the "giant" and Summy-Birchard is one of a few small competitors, the consent judgment in its present form serves no purpose.

This Court has stated, in *United States* v. *Loew's Inc.* that "to ensure . . . that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined" 371 U. S. 38, 53 (1962).

Our problem here is how to provide competition within the confines of a consent judgment when the major competitor, Columbia, holds most of the trump cards in the form of the major artists.

The Court below struck down one attempt by Summy-Birchard to compete in its "modified selective plan" for concert service. On the other hand, it provided leeway in the form of limiting control by Columbia over the resale prices of its artists.

CONCLUSION

Summy-Birchard Company is concerned only with having an opportunity to survive in this area of business. Without an imaginative interpretation, the consent judgment is a noose, not a life preserver.

Respectfully submitted,

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Appellant

against

UNITED STATES OF AMERICA, *et al.*
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF BY COLUMBIA IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF BY COLUMBIA IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM.

The Government moves to affirm the District Court's action on the grounds that:

1. The Order of the District Court merely construed, and did not modify, the Consent Judgment (M. A. 5);*

2. Properly construed, the Consent Judgment (VI(D)) forbade the practice in issue, even assuming the District Court supposed it was modifying the judgment (M. A. 12); and

3. In any event, Columbia has "been deprived of no privilege" (M. A. 5) recognized by the Consent Judgment, and the issue is "unimportant," (M. A. 5) having "only marginal significance" (M. A. 12).

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* "M. A." refers to the Government's Motion to Affirm.

As we shall show, the Government is in error on each of these points.

I. THE DISTRICT COURT MODIFIED—IT DID NOT MERELY CONSTRUE—THE CONSENT JUDGMENT.

A brief review of the record herein establishes:

1. The only issue tendered by the pleadings is the propriety under the judgment of the continued use by Columbia of the standard provision (quoted at pp. 3-4 *infra*) which provides in effect that a concert service must charge to the audience association the artist's established fee, unless the artist or his manager consents to a change;

2. An artist has an interest in providing his services at an established fee;*

3. The purpose of the standard provision was to protect this interest of the artist;

4. The use of the provision was compelled by Columbia's contract with the artists' union;**

---

* This is to maintain the artist's prestige. Also, since artists perform before audience associations close to each other (Petition Par. 8), the practice avoids any claim of discrimination by an audience association. For example, if an audience association pays $1,000 for an artist and another pays $800, the association discriminated against may refuse to book the artist thereafter.

** Columbia so alleged in Par. 21 of its Petition, which Summy-Birchard denied for lack of knowledge or information. Columbia was prepared to prove at trial that this union contract was made in 1954, before entry of the instant decree. The provision therein which compels Columbia to use the standard provision in its contracts with concert services reads:

> "Every Artist's Management Contract shall specifically state the minimum fee or range of fees below which, during the term thereof, Manager may not offer the services of such Artist for any concert or Civic or Community type of engagements whatsoever except with the specific written consent of the Artist. Such minimum fees may be changed only with the written consent of the Artist." (American

(note cont'd on next pg.)

5. The Court understood that the sole issue was the propriety of the contract provision under the judgment; and

6. The Court found it sanctioned by the judgment, but modified the judgment to forbid its further use.

a. The Dispute Which Gave Rise to Columbia's Petition.*

Beginning on or about October 1, 1962, Summy-Birchard's Civic division offered to audience associations a new form of agreement known as the "selective plan". In substance, under the selective plan, Civic imposed a charge upon audience associations for the services of its field representatives. This practice of Summy-Birchard gave rise to the first dispute between Columbia and Summy-Birchard (Claim I of Columbia's Petition for Construction).

To protect the interest of the artist in providing his services at a uniform fee, Columbia on behalf of its artists has for many years used a form contract between it and each concert service acting on behalf of an audience association, providing in part as follows:

> "It is agreed that this contract for the appearance of (Name of Artist) is solely for the purposes

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Guild of Musical Artists, Inc. A. F. of L.—Managers Agreement, December 2, 1954.)

Thus the Government is plainly wrong when it argues that Columbia "has no power to assert whatever privilege may be possessed by the performing artist himself with respect to the charge to the audience." (M. A. 10) The union has imposed upon Columbia and other managers the duty of charging the audience association the artist's established fee. We shall show in Point III *infra* that the consent judgment embodies the idea that the manager is under a duty to protect the interest of the artist in obtaining his established fee for audience association and other engagements.

* The facts stated herein with respect to the origin of the dispute between Columbia and Summy-Birchard are alleged in Columbia's Petition and admitted in Summy-Birchard's Answer.

> of an engagement on the organized audience series in (Town) for (Dates) at the fee of $..... per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained from the artist or his manager will void this contract."

Columbia's listings set forth the artist's established fee.

Since at least 1954, Summy-Birchard, or its predecessor company, with respect to each artist managed by it, has also entered into contracts on behalf of its artists with concert services and others, containing the identical provision set forth above.

On January 2, 1963, Summy-Birchard's Civic division wrote to Columbia asserting that this provision is illegal as a violation of the Sherman Act (Ex. E to the Petition). Summy-Birchard further informed Columbia that this provision violated Paragraph VI (D) of the Consent Judgment (Petition Par. 26, admitted in Summy-Birchard Answer). On February 14, 1963, Summy-Birchard, still asserting the provision to be illegal, signed Columbia's form contract "under protest" (Exhibit F to the Petition).

b. The Petition of Columbia for Construction.

The Petition of Columbia set forth, *inter alia*, the above facts, which Summy-Birchard admitted in its Answer. In Claim I of its Petition, Columbia asked the District Court to construe the consent judgment to determine whether Summy-Birchard no longer qualified as a concert service within the meaning of the judgment, and, therefore, was not entitled to margin, because it did not furnish field agents without charge.

In Claim II, Columbia asked the Court to construe the judgment and adjudge that the above provision does not violate any provision of the Consent Judgment.*

c. Position of the Parties in the District Court.

After Summy-Birchard's Answer to Columbia's Petition for Construction, the Government filed its Memorandum, dated September 1963, in which it took the position that Columbia was correct in Claim I and that as to Claim II, the dispute was outside the scope of the consent judgment, and in any event, it presented no justiciable controversy between Columbia and Summy-Birchard. The Government therefore requested that Claim II be dismissed.

Thereafter, Columbia submitted a Memorandum to the District Court in support of its Petition for Construction. As to Claim II, Columbia contended that this issue was not only within the scope of the judgment, but went to its very heart. Columbia's Memorandum analyzed at great length the provisions of the judgment to show that it not only sanctioned, but required, that Columbia and Civic both continue to use the disputed contract provision and that unless the artist or his manager, pursuant to the standard provision, retained and exercised the privilege of determining the artist's fee to an audience association, the entire consent judgment became unworkable.

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* The prayer for relief on Claim II recites:

> "That the Court issue an order construing the Final Judgment herein and providing that the provision in Columbia's contracts that each engagement before an audience association shall be performed at the artists' established fee for such engagement is not an illegal condition upon the artist's appearance, that such provision does not cause the artist to be unavailable to a concert service under Article VI(D) of the Final Judgment, and that the said provision does not violate Article VI(D) or any other provision of the Final Judgment."

Columbia contended finally, that only if the Court should be of the view that the dispute was outside the scope of the judgment, should it then, pursuant to the Declaratory Judgment Act, pass upon the validity of the provision under the antitrust laws.*

The Government never answered the elaborate arguments of Columbia that the consent judgment contemplated and sanctioned the use of this provision.

d. The District Court's Opinion.

In ruling in favor of Columbia on Claim I, the Court followed "the plain words of the decree" because, as the Court stated "they appear not to be inequitable or illegal" (J. S. A-7), and because "the decree does not in this area, necessarily conflict with the law" (J. S. A-8).**

The District Court, turning to Claim II, after defining the position of the parties, makes this initial statement:

> "The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer'—audience association, impressario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless. Since this court by its decree —albeit a consent order—has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system."

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* The Government agrees that Columbia's position was that the District Court should pass upon the validity of the provision under the antitrust laws only if it were to rule that the judgment does not sanction the standard provision of the contract (M. A. 4).

** As to Claim II, however, as we shall see, the Court found the decree conflicted with the law, and refused to follow—erroneously, we contend—"the plain words of the decree."

The Court then discussed the question of whether Summy-Birchard was seriously maintaining its contention that the contract was illegal, and finding that Summy-Birchard was so contending, the District Court elected to treat Summy-Birchard's Answer as a "petition for modification" (J. S. A-9, 10).

The Court then discussed Summy-Birchard's claim that the contested provision constitutes illegal price maintenance.*

The Court declared its intention to invalidate such part of the consent judgment as permitted Columbia to use the contested provision, in the following words:

> "Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid" (J. S. A-11).

The Court made it clear, however, that "invalidation of such part of the consent decree" did not affect its ruling on Claim I (J. S. A-11, 12).

The Government relies, as support for its view that the Court was merely construing the consent judgment, not modifying it, upon the fact that the Court, at the conclusion of its opinion states, "The request for a construction approving Columbia's contracts with concert services (Claim II) is denied" (M. A. 10). This statement proves no more than that, having determined that it must be modified, the District Court denied Columbia's request for a construction.

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* The District Court apparently concluded from *U. S.* v. *Swift & Co.*, 286 U. S. 106 (1932) that it had the power to modify the consent judgment to correct an error of law (J. S. A-9, n. 5). This was the critical mistake in the Court's reasoning.

e. The Motion for Reargument and the District Court's Opinion Thereon.

Columbia then moved for reargument and submitted its Memorandum of December 16, 1963 in support thereof. Columbia contended the Court lacked power under *U. S.* v. *Swift & Co.*, 286 U. S. 106 (1932) to invalidate that part of the judgment which sanctioned Columbia's use of the disputed provision. Columbia further argued that, assuming, *arguendo*, power to modify, the Court erred in ruling the contested provision illegal price maintenance, and that on the record, the legality under the antitrust laws of the contested provision was clearly established.*

The Government took no position on Columbia's motion for reargument. By opinion, dated January 14, 1954, Judge Tyler granted Columbia's motion for the purpose of determining whether an evidentiary hearing should be held on the question of whether Community Concerts (and presumably, therefore, all concert services) are agents of audience associations. This question would resolve the resale price maintenance question, since there can be no resale price maintenance if the artist or his manager controls the price at which the artist's performance is "sold" to the audience association.

A hearing was held before Judge Tyler on January 27, 1964, at which Government counsel failed to appear and at which counsel for Summy-Birchard stated that although he had not changed his position that the contested provision was illegal, he had not intended that the Court treat his answer to Columbia's petition as a petition for modification of the decree.

The Court set down another hearing at which it directed that Government counsel appear. On February 4, 1964,

* Columbia contended that if there were any factual issues with respect to whether the concert service was an agency of the audience association, as Columbia contended, there should be a hearing on this issue.

there was a further hearing at which the Government took the position that the Court should exercise jurisdiction under Claim II, and that it should reaffirm its original opinion. The Court on reargument adhered to its initial views.*

f. The Form of the Order.

The Government contends (M. A. 11) that the form of the order of the District Court "leaves the question open"

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* The Government relies on three sentences in the Court's opinion on reargument to support its position that this opinion establishes that the Court was merely "construing" and not "modifying" the judgment (M. A. 11).

(i) The Government states that in the opinion after reargument, the Court stated that in the first opinion it had merely refused to rule that Columbia's standard contract provision was proper under the decree (M. A. 11). The full sentence quoted by the Government in part and the sentence following read:

> "Second, Columbia urged the court to find and rule that a standard contract provision used by them in 'selling' performances to other concert services was proper under the decree. This the court refused to do in its same opinion of November 19."

These sentences do not prove that the District Court merely refused to find that Columbia's standard contract was proper under the consent judgment. The Court refused to do so because as it explained, the judgment thereby would have permitted illegal price fixing. Thus, the Court modified it to prevent continued price fixing under the judgment.

(ii) The second sentence relied upon by the Government (M. A. 11, J. S. A-19, n. 5) relates to the question of whether on the issue of the legality of the contested provision there should have been a hearing pursuant to the *White Motor* case. It does not bear in the slightest on the question whether the Court's opinion can be interpreted as a construction or modification.

(iii) The third sentence relied upon by the Government is the penultimate sentence of the opinion. The Government states that it "is at least susceptible of being read as an assertion that the court would not construe the consent decree as sanctioning a *per se* violation of the Sherman Act (J. S. A-20)." (M. A. 11). A reading of both opinions of the Court makes it plain that this penultimate sentence expresses the thought that although the contractual clause is in conformity with the consent judgment, the Court will not sanction it and therefore is modifying the judgment.

as to whether the Court construed or modified the Final Judgment.

The sequence of events leading to the formulation of the Final Order shows that the Court explicitly ruled that the consent judgment permitted use of the contested provision, but that Columbia would not, nevertheless, be allowed to rely upon the judgment and that the Court was modifying the judgment accordingly.*

After the District Court's opinion on reargument, the Government submitted its proposed form of decree. It contained only the first two sentences in Paragraph 2 of the Court's Final Order. Columbia then submitted its counter-proposed form decree which added the following sentence: "To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act."

In support of its counter-proposed decree, Columbia submitted a Memorandum which stated:

> "this Court has modified the Final Judgment by holding it to be in part illegal and void. Where a court modifies an outstanding decree, the order of the court should reflect that modification; this Court's order should show that the decree in this

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* Paragraph 2 of the Court's Final Order, which disposes of Claim II, reads as follows:

> "The Court has jurisdiction to determine the issues raised by Claim II. The provision in Columbia's contract (Petition, Exhibit D) that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. §1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid."

> case has been modified. It should be clear to the parties, to others in the industry and to the public that insofar as the decree clearly envisions that the artist or his manager will be able to control the ultimate price paid by the "consumer"—audience association, impressario, or whoever assumes the risk of "producing" a show . . .'. It is illegal and void.
>
> "While we adhere to the positions expressed in our Motion for Reargument, we submit that as a matter of basic fairness to all concerned, and to properly reflect its opinion in this case, the Court should include in its order the sentence which Columbia has suggested be added to the Government's proposed order."

The Government argued in its "Memorandum in Opposition to Columbia's Counter Order" that the additional sentence suggested by Columbia should not be included in the order because the Court did not "find a single word in the Final Judgment to be illegal and void" (p. 2) and that the Court found only the contested provision illegal.

The District Judge, in his Final Order, not only included the sentence suggested by Columbia in order to show that the consent judgment had been modified, but added in his own handwriting the following additional words:

> "and any continued reliance by Columbia upon such portion or portions of the Final judgment will not be construed by the Court to be in any way valid."

II. THERE WAS NO ISSUE NOR PROOF IN THE PROCEEDINGS BELOW OF ANY "ADDITIONAL REQUIREMENT."

The Government's motion to affirm is not based upon use of the standard contract provision by Columbia, but upon an alleged issue which was not part of the proceedings

below—an issue which originates from the imagination of Government counsel.

According to the Government, the issue below was not merely Columbia's use of the standard provision, but some "additional requirement". (M. A. 6) Thus, at the outset of its argument, the Government concedes that the consent judgment sanctioned the use of the disputed provision:

> "Appellant Columbia, as manager, thereafter refused to make artists available except under a standard form agreement. The agreement in effect required a concert service to charge the audience association (the 'consumer') the artist's 'established fee' and allowed the concert service the same 'margin' out of the fee enjoyed by appellant Community. Those terms were sanctioned by the decree." (M. A. 6)*

However, the Government's motion immediately adds:

> "Appellant Columbia also imposed as a condition of making an artist available the *additional requirement* that the concert service agree to retain the full margin for itself (J. S. A.-4, 5) instead of reducing the net cost to audience associations by rebating all or a part of the margin, as Summy-Birchard apparently was willing to do. When Summy-Birchard challenged the legality of *this additional requirement*, appellants instituted the present proceeding seeking a judicial determination: (1) that its practice not only did not violate but was affirmatively sanctioned by the consent judgment, and alternatively (2) that the practice, if not affected by the decree, was nevertheless lawful." (M. A. 6) (Emphasis supplied.)

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* In fact, the standard provision is not as strict as the Government states. It requires a concert service to charge the audience association the artist's "established fee" only if either the artist or his manager will not consent to a change in the fee.

This "additional requirement" is a myth. The sole act of Summy-Birchard was to object to signing the standard contract, which it finally did "under protest." Columbia imposed nothing more on Summy-Birchard than its standard agreement.

In its brief, the Government assumes that this record establishes that this "additional requirement" of Columbia had the purpose and necessary effect of (a) compelling the unaffiliated "concert service . . . to retain the full margin" (M. A. 6, see also 12) and (b) preventing such a service from accepting "a lower net return than the affiliated service" (M. A. 8). But there was no trial below, and no such findings were made.

Nor can such findings be supplied by inference from the mere use of the standard provision. Under that provision a concert service may, from moneys received as margin or from its capital and surplus, compete for audience associations by outright grants of money, loans, or supplying more than customary services. The standard contract provision merely prevents the concert service, in *the case of each individual artist,* from charging less to the audience association than the artist's established fee.

III. THE CONSENT JUDGMENT CANNOT BE REASONABLY CONSTRUED TO FORBID THE USE OF THE STANDARD PROVISION.

We have shown in I, *supra,* that the Court construed the consent judgment to authorize the standard provision, but modified it to forbid its further use. The Government apparently contends that this Court may uphold the ruling, if not the reasoning, of the District Court by a construction of the judgment which forbids the use of Columbia's standard provision (M. A. 12).

It is not clear whether the Government is arguing that the construction it contends for relates to the standard provision, or to the mythical "additional requirement" Columbia is alleged to have imposed. Since there was in fact no such "additional requirement", we will show here that the judgment cannot reasonably be construed to forbid the use of the standard provision; on the contrary, a fair construction of the judgment would lead to the conclusion that Columbia was under a duty to continue to use the standard provision to carry out its duties under the judgment.

The concept of an artist's "established fee" was woven into the entire fabric of the consent judgment. Paragraph II (J) defines "margin" to mean "the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience associations". Reference to the artist's "established fee" also appears in Paragraphs V(D)(3) and VI(C). Paragraph V refers to "the artist's established audience association fee".*

Paragraphs V(A) and (B) compel Civic and Community to furnish to audience associations organized by them the established audience association fee of any artist as determined *by the artist's manager*.** Civic and Community have no right, under the judgment, to inform the audience asso-

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* It will be recalled that in 1954, the year before entry of the consent judgment, the artists' union had imposed the obligation upon Columbia and other managers to charge the artist's established fee for all engagements, except when the artist consented otherwise. See Petition for Construction Par. 21.

** The Final Judgment contains not only the usual provisions enjoining the defendants from allegedly illegal practices but also imposes upon the defendants a series of affirmative duties to carry out the stated purposes of the decree. (Pars. V, VI and VII.) Thus, Paragraph V imposes duties upon Community and Civic which enable all managers to compete for engagements for their

(note cont'd on next pg.)

ciations organized by them that the established fee is anything other than that set by the artist's manager. Indeed, it would be a violation of the judgment for Community or Civic to inform their audience associations that an artist's established fee is other than the fee specified by the manager (Par. V(B)).

The consent judgment could not have been intended, on the one hand, to permit independent managers to furnish, through Civic and Community as intermediaries, the established fee and all other pertinent information about their artists to audience associations organized by Community and Civic, and on the other, to permit Community and Civic to vary those prices at will. Moreover, if the construction urged by the Government is correct, any concert service could vary the prices charged to audience associations organized by it, and within a short time an artist would not have any established audience association fee. Thus the privilege granted to all managers competing with Columbia or Summy-Birchard to furnish to all audience associations organized by Civic and Community the established fees of their artists would be thwarted—and more specifically, Columbia's right to compel Civic to furnish to

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artists before audience associations organized by either Community or Civic.

The machinery used by Paragraph V to accomplish this is to compel Community and Civic:

1. To make it known by advertisements that they will furnish to audience associations organized by them information supplied to them by any manager with respect to the availability and established audience association fee of any artist, provided the artist agrees to allow to Community and Civic a margin equal to the customary margin allowed to them by other artists with comparable fees;

2. To furnish such information to each audience association;

3. To make available to any manager certain information with respect to the audience associations organized by them; and

4. To use their best efforts to obtain any artist selected by an association organized by them.

all Civic's audience associations the established fees of Columbia artists.

Paragraph V(D) provides that Community and Civic must maintain and make available for inspection records as to each audience association organized by them to any manager who agrees, *inter alia*, to advise these defendants, prior to offering his artists to any audience association organized or maintained by Community or Civic at a fee less than that artist's established fee, that Community or Civic, as the case may be, is also authorized to offer such artist at the lower fee.

Simply stated, Paragraph V(D) provides for the following situation:

1. A manager of an artist desires to inspect the records of Community or Civic with respect to the audience associations organized by them;

2. The manager files an undertaking pursuant to Paragraph V(D) of the Decree, which then qualifies him to obtain these records;

3. The manager then obtains information with respect to the audience associations organized by Community and Civic;

4. The manager then goes directly to one of such audience associations and offers his artist at a fee below the established fee of the artist; and

5. In such event, Paragraph V(D)(3) permits Community or Civic, as the case may be, to offer the same artist to the same audience association at the lower fee offered by the manager, and still retain margin.

Clearly the above provision assumes that it is the manager who has the privilege of determining the fee to be paid

by the audience association, and that Community or Civic do *not* have the right to offer an artist at less than the artist's established fee—except where the manager, under the above circumstances, himself changes his artist's established fee by offering him to the audience association at less than his established fee.

Nothing could be clearer than that the consent judgment confers upon Civic and Community the privilege of varying the artist's established fee in *this one situation only*. If the Government's contention is correct—that Civic and any other concert service at all times can charge any price it may please to the audience association—this privilege of meeting the manager's lower price, conferred by the express language of the judgment upon Civic (and Community), is wholly gratuitous.

Paragraph VI(A) is also crystal clear on the question of who determines the fee to be charged to the audience association. That paragraph enjoins each defendant from "refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee *charged by such artist to comparable audience associations* where the artist is reasonably available for the desired performance." (Emphasis supplied.) In short, in the words of the judgment, the fee to audience associations is "charged by such artist",* not by a concert service.

Moreover, under Paragraph VI(A), if Columbia makes an artist managed by it generally available to audience associations organized by Community at let us say, $500, it must also make that same artist, if "reasonably avail-

* In some places the judgment assumes that the manager determines the fee, in others the artist. The judgment obviously regards this as immaterial, since the manager must charge the artist's established fee, except when the artist consents otherwise. See note, p. 14, *supra*.

able for the desired performance", available at the same price to an audience association organized by Civic or to any other financially responsible audience association. The purpose of Paragraph VI(A) is to give an audience association the right to obtain artists at the same fee paid by comparable audience associations. If a concert service is free to charge such price to its audience associations as it, and not the artist or his manager, determines, the right of the audience association to equal treatment is lost.

Paragraph VI(C) enjoins each defendant from:

> "Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;"

Thus the consent judgment recognizes clearly the power of the manager to determine the artist's established fee, but forbids one possible misuse of such power, namely, charging "less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant".

In sum, the construction urged by the Government:

1. Withdraws the privilege given by the consent judgment, directly and by implication, to all artists and managers, to determine the established fees for audience association engagements (Pars. II(J), V(A), V(D), VI(A), VI(C));

2. Curtails the privilege given to all managers by Pars. V(A) and (B) to compel Community and Civic to furnish information as to the artist's established fee to all audience associations organized by Community or Civic;

3. Specifically, deprives Columbia of the privilege given to it to compel Civic to furnish to audience associations its artists' established fees (Pars. V(A) and (B));

4. Makes a part of the decree surplusage (Par. V(D)(8)); and

5. Takes away the right of all audience associations to equal treatment in the matter of artists' fees (Par. VI (A)).

The District Court's modification, which the Government seeks to sustain by its theory of "construction," has made the decree a shambles.

What are the Government's contentions which can be weighed against this array of evidence that use of the standard provision was built into the judgment as a means of carrying out its purposes?

The premise of the Government's arguments is that "the aim of the decree was to open up to others all aspects of the business of arranging concerts by performing artists through audience associations". (M. A. 7) Here, again, the Government has conjured up a fact unsupported by the record; this is a blatant misstatement of the aim of the consent judgment. The judgment states its own purpose (Par. VII):

> "It being the purpose of this Final Judgment to facilitate and increase the booking of independently managed artists by audience associations organized or maintained by any of the defendants and to promote competition between defendants and between and among independent managers and defendants in the management of artists . . ." (J. S. A-28)

Once the true purpose of the judgment is understood—to increase the bookings of independently managed artists, and to promote the competition of independent managers with defendants—the judgment's sanction of the use of the standard provision becomes clear. All artists and managers, including the independents, were to continue to enjoy

the long-standing privilege of controlling their artists' fees to audience associations and to others; independent managers were to have the additional privilege of compelling defendants Community and Civic to make known to their organized audiences the established fees of the independents' artists (Par. V), which the independent managers would control. The last thing contemplated by the judgment was to take from the independent manager the privilege of determining his artists' fees to the audience associations organized by defendants Community and Civic and give this privilege to defendants Community and Civic—yet this is exactly what the construction claimed by the Government (and the Court's modification) accomplishes.

Continuing its recital of imaginary purposes of the judgment, the Government then states that another of its purposes "was to bar the appellants from discriminating in setting the fees and margins for particular concerts in such a way as to preserve their monopolistic position and defeat the purpose of opening up the business to others". (M. A. 7) The Government further states that the draftsmen of the decree "were concentrating on preventing discrimination against unaffiliated concert services" (M. A. 8). Of course, the decree "was concentrating" on no such thing (Par. VII).

Reasoning from the foregoing concocted purposes of the consent judgment, the Government argues that there was "little reason to be thinking of what the unaffiliated service might do with its margin or the possibility that the unaffiliated service would be willing to accept a lower net return than the affiliated service." (M. A. 8)

Here the Government substitutes for the plain words of the judgment its speculation as to what was in the minds

of the draftsmen based upon its prior erroneous assumptions of the judgment's purposes. In any event, as we have shown in Point II *supra*, this argues a non-existent issue.

The next argument of the Government relies on Par. VI(A) of the decree (M. A. 8). That paragraph compels Columbia and Summy-Birchard to make each artist available to all audience associations at the same fee charged by each artist to comparable audience associations. As stated, *supra*, p. 17, this provision of the judgment clearly contemplated that the fee to the audience association would be one "charged by the artist" and not charged by a concert service.

The last argument made by the Government is that "in any event, what the unaffiliated service does with its margin once received is obviously irrelevant to any of the problems of opening up the business and preventing discrimination. They are the problems with which the consent judgment is concerned." (M. A. 8) But the problems with which the consent judgment was concerned were to increase bookings of artists managed by independents in towns organized by Community and Civic. It was intended, to that end, to leave control of the artists' fees to the audience association in the hands of the artist or his manager, not the defendants. This is particularly demonstrated by Par. V(D) which authorizes Community and Civic to offer an independent artist to its organized audience associations at a fee less than the artist's established fee *only to meet the lower fee offered by the independent manager.* (Emphasis supplied.)

To sustain its "construction", the Government relies essentially on a double invention—the "additional requirement" issue never presented to the District Court and the invention of a new set of judgment "purposes". It may well be that upon reconsideration the Government

now prefers a consent judgment of different purposes and means. The judgment as agreed upon by the parties, however, permits no reasonable interpretation other than that the standard provision was sanctioned, indeed, its use was compelled by the judgment as part of the machinery of carrying out its stated purposes.

IV. THE QUESTIONS RAISED ON APPEAL ARE IMPORTANT AND SUBSTANTIAL.

Unless this Court expunges the District Court's modification of the judgment, and directs it to enter an order to the effect that the contested provision is sanctioned by the consent judgment:

1. The decree below becomes unworkable;

2. Columbia is put in peril of contempt (J. S. 14-15);

3. Columbia is deprived of the privilege sanctioned by the judgment of using its standard contract provision;

4. Columbia is deprived of the privilege of compelling Civic to furnish to its audience associations the established fees of Columbia's artists; and

5. A long-standing industry practice, compelled by the concert artists' union before entry of this decree, is held to constitute resale price maintenance without any trial.

Conclusion.

Columbia asked the District Court to approve its use of the contested provision. The Government now agrees that the consent judgment sanctioned its use (M. A. 6). Unless the Government can find in this record that Columbia imposed some "additional requirement" which would warrant modification of the decree—and there is none—the Government itself should ask this Court to remand

to the District Court with instructions to vacate the existing order, and enter one construing the decree to permit Columbia to use the contested provision.

Respectfully submitted,

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